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No. 97-1868

In The

Supreme Court of the United States

October Term, 1998

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

JOHN E. WARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the California notice-prejudice rule, which requires an insurer to demonstrate prejudice before it can deny a claim for benefits as untimely, is "saved" from preemption under Section 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), because it is a state law which "regulates insurance" under ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Insurance Commissioners ("NAIC") is a non-profit legal association whose members are the chief insurance regulators in each state, territory and the District of Columbia. The NAIC's purpose is to serve the public by assisting these regulatory officials in the pursuit of fundamental insurance regulatory objectives, including:

(1) Maintaining and improving State regulation of insurance in a responsive and efficient manner;

(2) Maintaining the reliability of insurance business with respect to financial solidity and guarantees against loss; and

(3) Ensuring the fair, just and equitable treatment of policyholders and claimants.

The issues in this case directly implicate the NAIC's objectives by addressing the scope of the provision in the Employee Retirement Income Security Act of 1974 ("ERISA") that saves state laws that regulate insurance from ERISA preemption. The "saving clause" was enacted to preserve the states' traditional regulation of insurance. The NAIC and its members have an ongoing

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel for *amicus curiae* states that neither counsel for Petitioner nor for Respondent authored this brief, in whole or in part, and no person or entity other than this amicus made a monetary contribution to the preparation or submission of this brief.

Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

interest in ensuring that the saving clause is interpreted and applied properly. In particular, the NAIC has an interest in ensuring that state laws, including the California notice-prejudice rule at issue in this case, protect insurance claimants such as Respondent from being denied benefits in contravention of applicable state insurance law.

STATEMENT OF THE CASE

Amicus incorporates by reference the Statements of the Case submitted by Respondent and the United States as *Amicus Curiae*.

SUMMARY OF ARGUMENT

This case presents the Court with an opportunity to reaffirm the broad extent to which state insurance laws and regulations are saved from ERISA preemption and to ensure that ERISA preemption is not used as a defensive tool to negate substantive state law protections afforded participants and beneficiaries under insured ERISA plans. At issue is California's "notice-prejudice rule," which precludes arbitrary time-barring of claims by requiring an insurer to show that it has been prejudiced before it can deny a claim for benefits under an insurance

policy based on the claimant's failure to provide notice within the time limit set forth in the policy.[2]

Petitioner contends that the notice-prejudice rule is preempted by ERISA. 29 U.S.C. § 1144(a). To the contrary, ERISA does not bar application of the notice-prejudice rule to insurance policies purchased by ERISA plans because the rule fits squarely within ERISA's so-called "saving clause." 29 U.S.C. § 1144(b)(2)(A). The saving clause excepts from ERISA preemption every state law which "regulates insurance," with one narrow exception not relevant to this case. *See id.*

In determining whether a state statute, regulation, or common law regulates insurance within the meaning of ERISA, this Court applies a "common sense" test. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). As a matter of common sense, the notice-prejudice rule regulates insurance: the requirements for submitting a claim are central to the insurance relationship and go directly to whether the insurer will bear the risk of loss it promised to assume.

Petitioner contends that the saving clause does not prevent preemption of the notice-prejudice rule because that rule fails to satisfy the three-factors designed as "guideposts" for interpreting the "reverse preemption" clause of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). This Court has not required that these factors be rigidly

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[2] "[A]t least twenty-five states currently follow some variation of the notice-prejudice rule, demonstrating its widespread acceptance." *Cisneros v. UNUM Life Ins. Co.*, 134 F.3d 939, 945 (9th Cir. 1998) (citation omitted), *petition for cert. filed*, 66 U.S.L.W. 3773 (U.S. May 20, 1998) (No. 97-1867).

applied in ERISA saving clause analysis. Indeed, if the three factors were rigidly applied, basic state laws which regulate insurance as a matter of common sense would be in jeopardy of preemption. Such a result would be contrary to preserving the traditional system of state insurance regulation which Congress intended in enacting the saving clause.

Further, ERISA's saving clause is broader than the McCarran-Ferguson Act's narrow exemption for the business of insurance from federal antitrust laws. For these reasons, strict application of the McCarran-Ferguson factors does not and should not control saving clause analyses.

Petitioner's argument that the notice-prejudice rule is preempted because it conflicts with ERISA's substantive provisions is equally unavailing. The plain language of Section 514(a) makes clear that state laws which regulate insurance, whether procedural or substantive, are exempt from the reach of ERISA's preemptive language.

Moreover, nothing in the language of ERISA or in the Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), supports the theory that every state law which is remedial in nature is preempted. Many state laws central to sound insurance regulations, including laws providing a state insurance commissioner authority to discipline insurers which fail to maintain an adequate net worth, engage in a pattern of unlawful discriminatory treatment towards a group of policyholders, or fail to control misleading representations made by agents, remain in force regardless of whether such matters impact insured ERISA plans.

Even if Petitioner's conflict preemption approach applied in this case, the notice-prejudice rule does not conflict with ERISA. Respondent has asserted a claim for benefits under ERISA, and the notice-prejudice rule is simply a procedural rule which is relevant to determining the validity of that claim. The notice-prejudice rule is also consistent with ERISA's goal of maximizing benefits for participants and beneficiaries. Therefore, the notice-prejudice rule is not preempted by notions of conflict preemption.

Finally, the emphasis which Petitioner and its supporting amici place on notions of uniform federal regulation of employee benefit plans is misplaced. Congress and the courts have recognized and appreciate the fact that the enactment of ERISA created a "disuniformity" between self-insured plans, which are primarily subject to federal regulation, and insured plans, which are subject to federal regulation and indirectly to state insurance regulations. *See, e.g., Metropolitan Life*, 471 U.S. at 747. That dichotomy is the natural and inevitable result of Congress's decision to preserve state regulation of insurance.

Petitioner's obligation to ensure that the terms and conditions of its group policies comply with all applicable state laws is no different than its obligation with respect to its individual disability policies offered across the country. Regardless of whether a policy provides benefits to one beneficiary under an individual policy or 1,000 beneficiaries under a group policy, state insurance regulations apply.

As the federal and state governments (the United States, the National Association of Attorneys General, and the NAIC) have demonstrated in their amicus briefs, the enactment of ERISA in 1974 did not extinguish application of state insurance laws and regulations to licensed insurers furnishing insurance benefits to ERISA plans. Petitioner's attempt to narrow the effectiveness of the saving clause should be defeated by affirming the decision of the Ninth Circuit.

ARGUMENT

I. THE NINTH CIRCUIT CORRECTLY HELD THAT THE NOTICE-PREJUDICE RULE IS SAVED FROM ERISA PREEMPTION BY THE INSURANCE SAVING CLAUSE.

A. The Insurance Saving Clause Provides A Broad Exception To ERISA's Preemption Of State Laws.

Petitioner suggests that the saving clause should be read narrowly. However, this Court has recognized: "While § 514(a) of ERISA broadly pre-empts state laws that relate to an employee-benefit plan, that preemption is substantially qualified by an 'insurance-saving clause,' which broadly states that, with one exception, nothing in ERISA 'shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.' "[3] *Metropolitan Life*, 471 U.S. at 733

[3] The so-called "deemer clause" exception to the saving clause is not applicable here. The deemer clause provides that a state law that purports to regulate insurance by "deeming" a plan to be an insurance company is not saved from ERISA preemption. 29 U.S.C. § 1144(b)(2)(B). Petitioner contends that the deemer clause bars the application of the notice-prejudice rule to Petitioner as the entity reviewing a denied claim. *See* Petitioner's Brief at 37. However, the deemer clause is directed at ensuring that self-insured plans remain outside the scope of state insurance regulation. *See Metropolitan Life*, 471 U.S. at 747. Because this case does not involve a self-insured plan, Petitioner's argument that the deemer clause bars the application of the notice-prejudice rule as to Petitioner is misplaced.

(citation omitted). "[W]hile the general preemption clause broadly pre-empts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation." *Id.* at 739-40.

Given the plain language and meaning of the statute, this Court has stated that it "also must presume that Congress did not intend to pre-empt areas of traditional state regulation." *Id.* at 740. *See also FMC Corp. v. Holliday*, 498 U.S. 52, 63 (1990) ("[W]e observe Congress' presumed desire to reserve to the States the regulation of the 'business of insurance.' "). The business of insurance has traditionally been regulated by the states. The very purpose of the saving clause as applied to the regulation of insurance was and is to preserve state regulation of insurance policies purchased by ERISA plans.

The Supreme Court has rejected the notion that the saving clause should be interpreted narrowly as Petitioner suggests in this case:

> If a state law "regulates insurance," . . . it is not preempted. Nothing in the language, structure,

> or legislative history of the Act supports a more narrow reading of the clause, whether it be the [Massachusetts] Supreme Judicial Court's attempt to save only state regulations unrelated to the substantive provisions of ERISA, or the insurers' more speculative attempt to read the saving clause out of the statute.

Metropolitan Life, 471 U.S. at 746-47.

Maintaining the viability of the saving clause is also consistent with ERISA's goal of protecting benefits available under ERISA plans. *See, e.g.*, 29 U.S.C. § 1001 (setting out congressional policy regarding ERISA); S. Rep. No. 93-127, 93rd Cong., 1st Sess. 18 (1973) (coverage is to be construed liberally to provide the maximum degree of protection to participants); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) ("ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans.") (Quotation omitted).

Through ERISA and the insurance saving clause, ERISA plan participants and beneficiaries and employers who sponsor ERISA plans thus enjoy the protections afforded by ERISA and, if covered by insured plans, the protections afforded by state insurance laws and regulations, as well. The fact that many employers elect to purchase insured products to provide coverage for their employees reflects the advantages that such plans offer when compared with self-funded plans.

For example, insured plans have solvency protections afforded by state insurance regulation and access to guaranty association coverage. Employers thus can avoid or limit the risk of plan failure, as well as the possibility that they would have to fund any shortfall. Although there

may be trade-offs that accompany these protections, the federal and state regulatory systems are most effective with a broad interpretation and application of the saving clause.

B. As A Matter Of Common Sense, The Notice-Prejudice Rule "Regulates Insurance" And Is Therefore Saved From ERISA Preemption Under The Saving Clause.

This Court has effectuated Congress' intent regarding the saving clause by instructing that state laws which regulate insurance as a matter of "common sense" are saved from ERISA preemption. *Metropolitan Life*, 471 U.S. at 740. *See also Pilot Life*, 481 U.S. at 48. This Court has explained that "[w]e have identified laws governing the 'business of insurance' in the Act to include not only direct regulation of the insurer but also regulation of the substantive terms of insurance contracts." *FMC Corp. v. Holliday*, 498 U.S. at 62 (citing *Metropolitan Life*, 471 U.S. at 742-44). Such laws include those governing the sale and advertisement of insurance and laws specifying the content of insurance contracts. *Metropolitan Life*, 471 U.S. at 727-28. *See also id.* at 728 n.2. Clearly, the notice-prejudice rule is directed to the substance of Petitioner's insurance policy and thus "regulates insurance."

In *Metropolitan Life*, this Court addressed whether ERISA preempted a Massachusetts law which mandated that minimum mental health care benefits be provided to Massachusetts residents insured under a general insurance policy, an accident or sickness insurance policy, or an employee health care plan that covered hospital and

surgical expenses. 471 U.S. at 727. The insurance companies argued that the law was not saved from preemption because it was a health law, not a traditional insurance law. *Id.* at 741. Rejecting the insurers' position, the Court found that as a matter of common sense, the State law regulated the terms of certain insurance contracts and was protected from preemption by the saving clause. *Id.* at 740-41.

More recently, this Court explained that while the deemer clause preempted a state anti-subrogation law as to self-insured plans, the saving clause would have saved the law from preemption for insurance contracts purchased by ERISA plans because the law "directly control[led] the terms of insurance contracts by invalidating any subrogation provisions that they contain." *FMC Corp. v. Holliday*, 486 U.S. at 61. The Court plainly stated: "[the law] does not merely have an impact on the insurance industry; it is aimed at it." *Id.* (Citing *Pilot Life*, 481 U.S. at 50). "Unless the [state subrogation] statute is excluded from the reach of the saving clause by virtue of the deemer clause, . . . it is not pre-empted." *Id.*

In this case, Petitioner's incorrect, narrow interpretation of the notice-prejudice rule and the saving clause defies common sense. Like the state anti-subrogation law in *FMC Corp. v. Holliday*, the notice-prejudice rule "directly controls the terms of insurance contracts" by invalidating a policy's time limit for applying for benefits unless the insurer can show that it was prejudiced by the claimant's delay. *See* 498 U.S. at 61. The rule affects the primary issue in any insurance dispute: whether the insured or the insurer will bear the risk of loss which the insurer promised to assume when it issued the insurance

policy. Simply put, granting or denying a claim for benefits under an insurance policy *is* the business of insurance.

Petitioner and its supporting amici contend that the notice-prejudice rule does not regulate insurance as a matter of common sense because the rule is not specifically directed at the insurance industry. Their argument fails for two reasons. First, on its face, the rule regulates insurance. *See Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 760 (1993) ("California law is settled that a defense based on an insured's failure to give timely notice requires the insurer to prove that it suffered substantial prejudice."). As the United States Court of Appeals for the District of Columbia Circuit recently asked: "[i]f California's [notice-prejudice] rule does not regulate insurance, what does it regulate?" *O'Connor v. UNUM Life Ins. Co.*, 146 F.3d 959, 963 (D.C. Cir. 1998) (holding that the notice-prejudice rule is not preempted by ERISA) (quoting *Cisneros v. UNUM Life Ins. Co.*, 134 F.3d at 946).

Second, any common law of a specific industry may bear a relation to ancient tenets at English common law. Tracing a common law of insurance or any other industry back to its roots in this way could inevitably lead to the conclusion that it was preempted because it is not directed at that industry. This exercise is flawed because the saving clause makes no distinction between state common law and statutory law. *See* 29 U.S.C. § 1144(c)(1) (defining "State law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.").

The Ninth Circuit's holding that the notice-prejudice rule regulates insurance and is therefore saved from preemption should be affirmed under the "common sense" test.

C. Petitioner's Rigid Application Of The Three McCarran-Ferguson Act Factors Is Erroneous.

On its face, the notice-prejudice rule is directed at the insurance industry. Nevertheless, Petitioner insists that the rule does not regulate insurance because it does not satisfy a technical checklist based on three factors originally developed by this Court for interpreting the "reverse preemption" clause of the McCarran-Ferguson Act. *See* Petitioner's Brief at 22-23. *See also Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) (identifying the three criteria "relevant in determining whether a particular practice is part of the 'business of insurance' exempted from the antitrust laws by § 2(b)").[4] Petitioner's argument, and the lower court decisions on which Petitioner relies, seriously misconstrue the purpose and meaning of this Court's three-factor McCarran-Ferguson analysis.

The three factors are "simply relevant considerations or guideposts" for clarifying the common sense meaning of insurance regulation, not a reason for negating it. *See Cisneros*, 134 F.3d at 946. *See also FMC Corp. v. Holliday*,

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[4] The three factors are whether the law spreads risk, is an integral part of the relationship between the insurer and the insured, and is directed to entities within the insurance industry. *Pireno*, 458 U.S. at 129.

498 U.S. at 61 (Court recognized that state subrogation law regulated insurance without considering the McCarran-Ferguson factors); *Metropolitan Life*, 471 U.S. at 743 (noting that the three factors are "relevant"). The Fifth Circuit thus mistakenly held to the contrary in *CIGNA Health Plan of Louisiana, Inc. v. State ex rel. Ieyoub*, 82 F.2d 642, 650 (5th Cir.), *cert. denied*, 117 S. Ct. 387 (1996). Indeed, this Court expressly held in *Pireno*, a case interpreting the "business of insurance" under the McCarran-Ferguson Act, that "[n]one of these criteria is necessarily determinative in itself." 458 U.S. at 129.

The Ninth Circuit thus correctly found that the three factors, while relevant, were not to be applied rigidly. *See Cisneros v. UNUM Life Ins. Co.*, 134 F.3d at 946. *See also Ward v. Management Analysis Co. Employee Disability Ben. Plan*, 135 F.3d 1276, 1280 (9th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3257 (U.S. Oct. 13, 1998) (No. 97-1868). Accordingly, the Ninth Circuit found the notice-prejudice rule was not preempted even though it held that the rule did not meet all three factors. *Cisneros*, 134 F.3d at 945-46. The Ninth Circuit elaborated:

> We find unconvincing the idea that Congress and ERISA would save and thereby enforce a state law mandating insurance companies to provide specified coverage whether purchased by the insured or not, yet pre-empt and thereby nullify a state law requiring an insurer to show actual prejudice from late notice before it refuses to pay benefits purchased by the insured.

Id. at 946-47.

Indeed, if the three factors were rigidly applied as Petitioner argues, laws which satisfy the basic common sense meaning of the term "regulate insurance" could be endangered for failure to meet strictly each and every one of the three factors. For example, HMOs have argued that they are not properly subject to state insurance laws because they do not spread risk, but rather provide medical services through access to a medical network, with that network purportedly bearing the risk of loss. However, common sense mandates that HMOs are in the business of insurance:

> In the end, HMOs function the same way as a traditional health insurer: The policyholder pays a fee for a promise of medical services in the event that he should need them. It follows that HMOs (and HCSCs) are in the business of insurance.

Washington Physicians Serv. Ass'n v. Gregoire, 147 F.3d 1039, 1046 (9th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3376 (U.S. Nov. 23, 1998) (No. 98-889). *See also* 29 U.S.C. § 1193(b)(2) (1996) (in enacting the Health Insurance Portability and Accountability Act in 1996, Congress amended ERISA's definition of "health insurance issuer" to include HMOs, specifically recognizing that HMOs may be "subject to State law which regulates insurance (within the meaning of [ERISA] § 514(b)(2))." Accordingly, state insurance laws which regulate HMOs are properly saved from preemption.

Moreover, in enacting ERISA, Congress expressly preserved the basic system of state regulation of insurance, with the state insurance commissioners as the primary regulators. That basic regulatory process remains in force.

The five volume set of NAIC MODEL LAWS, REGULATIONS, AND GUIDELINES (NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 1998) ("MODEL LAWS") reveals the vast area occupied by state insurance regulation. The annotations to the MODEL LAWS list thousands of state statutes which address such varied topics as insurance company management, investments, accounting requirements, minimum risk based capital, reserve standards, examinations, prohibited insider transactions, insolvency and rehabilitation standards, guaranty funds, agent and broker licensing, contract forms, rating laws, unfair discrimination against policyholders, and improper termination of coverage.

Application of state regulatory powers to insurers, agents, and other licensees engaged in the business of insurance remains the primary function of state regulators. Use of the state administrative law process is central to that function, whereby remedial statutes imposing fines, license suspension or revocation, and requirements of corrective action are applied frequently and routinely. The existence and possible application of those statutes assure a stable and well-functioning insurance market.

Neither the language of ERISA nor the *Pilot Life* decision supports any erosion of state law regulatory powers. To the contrary, the saving clause clearly supports the viability of state insurance regulations.

Further, ERISA's saving clause has been construed more broadly than the corresponding language of the McCarran-Ferguson Act's antitrust exemptions, which is unique in providing reverse preemption of a substantial body of federal law by state law. *Compare* 15 U.S.C.

§ 1012(b) and 29 U.S.C. § 1144(b). The purpose of the second clause of § 1012(b) "was to carve out only a narrow exemption for 'the business of insurance' from the federal antitrust laws." *United States Department of Treasury v. Fabe*, 508 U.S. 491, 505 (1993). By contrast, the saving clause under ERISA has broad application. *See Metropolitan Life*, 471 U.S. at 733. Therefore, strict application of the three McCarran-Ferguson factors does not and should not control in ERISA saving clause analyses. *See O'Connor v. UNUM*, 146 F.3d at 963.

Finally, even though all three factors need not be met for purposes of ERISA's saving clause, the notice-prejudice rule does in fact possess all three McCarran-Ferguson attributes. The notice-prejudice rule addresses the first McCarran-Ferguson factor of spreading risk because Petitioner's stringent procedures for filing a claim for benefits are an attempt by an insurer to negate the risk transfer they promise to assume. The notice-prejudice rule determines whether the claim filing deadline in the insurance contract will be enforced.

The second factor is satisfied because the notice-prejudice rule "directly regulates the relationship between the insurer and the insured." *O'Connor v. UNUM*, 146 F.3d at 963. *See also SEC v. Nat'l Securities, Inc.*, 393 U.S. 453, 460 (1969) (recognizing the second factor as the "focus" of the term "business of insurance.")

The third factor is satisfied because the notice-prejudice rule applies only to the insurance industry. *See O'Connor v. UNUM*, 146 F.3d at 963. *See also Cisneros v. UNUM*, 134 F.3d at 946. Indeed, the rule is expressly stated in terms of prejudice to an "insurer" resulting from

untimely notice. *See Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th at 760.

For these reasons, as well, the notice-prejudice rule "regulates insurance" and is thus saved from ERISA preemption.[5]

II. THE NOTICE-PREJUDICE RULE IS NOT PREEMPTED BY AN ALLEGED CONFLICT WITH THE SUBSTANTIVE PROVISIONS OF ERISA.

A. The ERISA Saving Clause Preserves From Preemption All State Laws Regulating Insurance.

The saving clause does not distinguish between state insurance laws that conflict with ERISA and those that do not. Rather, it saves from ERISA preemption all state laws that regulate insurance. In enacting ERISA, Congress did not intend to sweep aside state laws and remedies that regulate insurance. *See* Brief of the United States as Amicus Curiae at 28. "[T]he insurance savings clause, on its face, saves state law conferring causes of action or affecting remedies that regulate insurance, just as it does state mandated-benefits laws and other prescriptive measures that do so." *Id.* at 29-30.

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[5] Even if the Court were to determine that the notice-prejudice rule is not saved from preemption and that the *Elfstrom* rule addressed by the parties and other amici relates to an ERISA plan, the Court should nonetheless uphold the Ninth Circuit's decision in favor of Respondent. To the extent the *Elfstrom* rule directly governs the relationship between and among the insurer, the employer in its capacity as group policyholder and the insured certificateholders, then it clearly regulates insurance and would be saved from preemption.

This Court has explained this point in addressing the removal to federal court of a case in which the State of California Franchise Tax Board sought to enforce a tax levy against money held in a self-funded ERISA vacation trust fund:

> Section 502(a) specifies which persons – participants, beneficiaries, fiduciaries or the Secretary of Labor – may bring actions for particular kinds of relief. It neither creates nor expressly denies any cause of action in favor of state governments, to enforce tax levies or for any other purpose. It does not purport to reach every question relating to plans covered by ERISA. Furthermore, § 514(b)(2)(A) of ERISA, 29 U.S.C. § 1144(b)(2)(A), makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans. With important, but express limitations, it states that "nothing in this subchapter shall be construed to relieve any person from any law of any State which regulates insurance, banking, or securities."

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 25 (1983) (footnote omitted). Although the State in *Franchise Tax* was not seeking to enforce a state insurance regulation, this Court recognized the breadth of the saving clause and the importance of allowing state regulatory bodies to enforce their laws and regulations.

States clearly have the obligation and the right to protect the interests of their citizens with regard to insurance benefits through the enforcement of state insurance laws and regulations. Protection of these enforcement mechanisms is fundamental to the regulatory fabric in which ERISA was enacted. Both the federal and state

governments which have filed amicus briefs in this case agree that ERISA § 502 does not and cannot foreclose access to state-created insurance regulations or sanctions which enforce substantive state insurance laws. 29 U.S.C. § 1132. Congress saved both state substantive insurance law and those measures necessary to enforce state substantive insurance law when it enacted the saving clause. *See* Brief of United States as Amicus Brief at 29 n.12.

The issue in this case differs fundamentally from *Pilot Life*. In that case, this Court recognized that Mississippi's common law of bad faith was not saved from preemption because it did not regulate insurance as a matter of common sense, instead being a law of general application. *Pilot Life*, 481 U.S. at 50.

By contrast, the notice-prejudice rule regulates insurance as a matter of common sense. It follows that the notice-prejudice rule does not and cannot conflict with ERISA's enforcement mechanisms or its fiduciary provisions because ERISA regulates employee benefit plans, not insurance. Therefore, conflict preemption does not serve as a proper basis for analyzing laws, including the notice-prejudice rule, that are saved from preemption by the express language of the saving clause.

B. The Notice-Prejudice Rule Does Not Conflict With The Substantive Provisions Of ERISA.

Even if conflict preemption were a proper basis for analyzing whether a state insurance law is saved from preemption, the notice-prejudice rule is nevertheless saved. That rule does not conflict with ERISA's civil enforcement provisions or ERISA's fiduciary standards,

including the requirement that an employee benefit plan be administered in accordance with its written terms.[6] Petitioner cannot avoid the application of a state law that is otherwise saved from preemption merely because the state law is not incorporated into the terms of Petitioner's policy.

The United States Court of Appeals for the Eighth Circuit rejected such an argument in *United of Omaha v. Business Men's Assur. Co.*, 104 F.3d 1034, 1041 (8th Cir. 1997). In that case, the Court addressed whether ERISA preempted a Missouri statute requiring group health

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[6] The meaning of a "conflict" between ERISA and state law has been addressed with respect to Section 514(b)(6)(A)(ii) of ERISA, 29 U.S.C. § 1144(b)(6)(A)(ii), which excludes MEWAs that are not fully insured from the protection of the deemer clause even if they qualify as ERISA employee benefit plans. Notwithstanding the deemer clause, state insurance laws may be applied directly to such plans to the extent they are "not inconsistent with" ERISA. 29 U.S.C. § 1144(b)(6)(A)(ii). Before invalidating a state law on this basis, courts require that the alleged inconsistency "directly conflict" with ERISA, meaning that compliance with the state law would violate ERISA or its congressional intent. *See, e.g., Fuller v. Olson*, 907 F. Supp. 257, 261 (W.D. Mich. 1995) (finding that Michigan statute requiring MEWA to obtain certificate of authority not preempted). Significantly, the Court in *Fuller* elaborated: "where Congress has expressly permitted states to regulate MEWAs to an extent not inconsistent with ERISA, it is not enough to argue that burdens imposed by state regulation but not imposed by ERISA are 'inconsistent' and therefore preempted." *Id.* Applying the same reasoning, the notice-prejudice rule is properly saved from preemption under § 514(b)(2)(A) because ERISA is silent on the time for making a claim, and the notice-prejudice rule is otherwise consistent with ERISA's purpose of protecting participants' benefits.

insurance policies to provide an extension of benefits for totally disabled beneficiaries upon the plan's termination or discontinuation. *Id.* at 1037. The Court held that the Missouri statute was saved from ERISA preemption. *Id.* at 1041.

In so holding, the Eighth Circuit recognized that the Missouri statute negated a provision in the insurance policy at issue which provided that benefits would only be extended until the recipient obtained other coverage. *Id.* Having found the statute to be saved from preemption, the Court refused to permit a conflicting provision in defendant's plan to override the statute. *Id.* "To do so would be to open the door for insurance companies to avoid any state insurance law simply by including a contrary provision in their group ERISA welfare plans." *Id.*

Similarly in this case, Petitioner cannot avoid an otherwise applicable state law by pointing to contrary provisions in its policy. To hold otherwise would effectively "read[ ] the saving clause out of [ERISA]." *Metropolitan Life*, 471 U.S. at 747.

Further, ERISA's claims procedures do not conflict with the notice-prejudice rule. Petitioner's reliance on *Pilot Life* on this point is thus misplaced.

In *Pilot Life*, the Court considered whether ERISA preempted a state law cause of action for improper claims processing. 481 U.S. at 43. That state law would have provided the plan participant with a remedy which ERISA did not provide. The Court held that the law was preempted because (1) it did not regulate insurance within the meaning of the saving clause, and (2) Congress

intended for ERISA's civil enforcement scheme to be exclusive. *Id.* at 57.

In contrast to the state law at issue in *Pilot Life*, the notice-prejudice rule is not a remedial provision in its own right, but rather a rule to be applied in conjunction with an action for benefits under an insured ERISA plan pursuant to 29 U.S.C. § 1132(a)(1)(B). Further, in contrast to Congress's careful listing of remedies under ERISA § 502(a), ERISA imposes no time limit on a participant's administrative claim. *See* 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1(c)-(g). Therefore, even if the conflict preemption analysis of *Pilot Life* were appropriate here, the holding in *Pilot Life* should not be read so expansively as to conclude that ERISA's claims procedures negate the effect of the saving clause in this case.

Boiled to its essence, Petitioner's sweeping allegation on pages 16-17 of its Brief that "ERISA's preemption clause bars all state law intrusion in the areas of fiduciary conduct and employee benefit plan administration" is an attempt to read out of the saving clause state laws that regulate any kind of insurance claims procedure. ERISA's substantive provisions, which are silent on the time limit for making an administrative claim, do not override the notice-prejudice rule which is otherwise saved from preemption. Because that state law does not conflict with ERISA, it should be enforced by affirming the Ninth Circuit's decision.

C. Congress Expressly Allowed For A "Disuniformity" Of ERISA Plan Regulation By Virtue Of The Saving Clause.

Finally, Petitioner and its supporting amici place undue reliance on the need for uniformity of employee benefit plan regulation through ERISA. When ERISA was enacted, Congress recognized and supported the continuation of state regulation of insurance through the saving clause. ERISA provides an opportunity for employers to design and implement employee benefit plans on a nationwide, uniform basis through the use of self-insured employee benefit plans which are exempt from state regulation pursuant to the deemer clause of ERISA, 29 U.S.C. § 1144(b)(2)(B).

This Court has previously rejected the "uniformity" argument propounded by Petitioner:

> We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing we merely give life to a distinction created by Congress in the "deemer clause," a distinction Congress is aware of and one it has chosen not to alter.
>
> We also are aware that appellants' construction of the statute would eliminate some of the disuniformities currently facing national plans that enter into local markets to purchase insurance. Such disuniformities, however, are the inevitable result of the congressional decision to "save" local insurance regulation.

Metropolitan Life, 471 U.S. at 747. *See also FMC Corp. v. Holliday*, 498 U.S. at 61-63.

Enforcement of the saving clause by affirming the Ninth Circuit's decision is thus consistent with the language and purpose of ERISA. Any challenge to that decision based on concerns of "disuniformity" "must be directed at Congress." *Metropolitan Life*, 471 U.S. at 747. Under existing law, the state law notice-prejudice rule is fully effective as to Petitioner and the decision below should thus be affirmed.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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